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FEDERAL TAXATION OF CHILD LABOR.—It is satisfying to note that very recently the Supreme Court has, in *Hammer* v. *Dagenhart*,[1] taken a long step towards establishing forever the right of a State to control its internal affairs without any outside intervention, in declaring unconstitutional the act of Congress entitled, "An act to prevent interstate commerce in the products of child labor and for other purposes, * * * ."[2] The passage of this act was an attempt by the Federal Government to regulate conditions of labor within the State by providing that products of child labor could not be transported in interstate commerce. It was declared invalid because, although superficially an attempt to regulate interstate commerce, it was, in reality, an attempt to regulate labor conditions within the State, and these conditions, being local in their nature, do not come within the regulative jurisdiction of Congress. Thus, it has been firmly established by our highest court that the power to regulate labor is inherently a State right and cannot be interfered with by Congress.

Not satisfied with this rebuff, Congress has again attempted to usurp this power, this time by the very effective means of taxation.[3] It is plain that the purpose of Congress is to circumvent the

[1] 247 U. S. 251.
[2] 39 Stat. 675, Comp. Stat. '16, § 8819a.
[3] "Every person (other than a bona fide boys' or girls' canning club recognized by the Agricultural Department of a State and of the United States) operating (a) any mine or quarry situated in the United States

decision of the Supreme Court, and a law passed for such a purpose should certainly be bulwarked by every necessary legal requisite, and the omission of the slightest essential or the presence of the smallest defect should be sufficient to render it invalid.

It cannot be denied that Congress has the power to tax indirectly everything within its jurisdiction, with two restrictions or qualifications, namely: (1) All tax laws must be uniform throughout the United States. (2) Property must not be taken without due process of law. The first requirement is not violated by Federal taxation of manufacturers employing child labor, since uniformity throughout the United States applies only to geographical uniformity and not to any idea of equality as applied to classes.[4] It is a conceded fact that the purpose of this tax is not to raise revenue but to drive child labor out of existence, something which the Supreme Court has said Congress has no power to do. Even though that be not its express purpose it would be so construed, since a statute must be judged by its natural and reasonable effect.[5] However, this bare statement alone does not change the situation, because the courts cannot look to the purpose or motive of the legislature in enacting tax laws, but the constitutionality or unconstitutionality of such laws must be determined solely upon the question whether or not the subject taxed was within the taxing power of the legislative body which enacted the law.

The situation resolves itself into this: Congress has the power to tax manufacturers; Congress is not limited in its taxing power by any requirement of equality or apportionment among objects of different classes; the courts cannot look to the motive of Congress in taxing unless the levy of the tax would constitute the taking of property without due process of law, and the taking of property or rights by the legislature in an unlawful manner is taking property without due process of law. The question then remains: Is Congress, when taxing manufacturers employing child labor, for the purpose of destroying such labor, depriving them of a right in an unlawful manner?

As has been shown, Congress has the right to levy indirect taxes, untrammelled by any requirement of equality or apportionment, but

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in which children under the age of sixteen years have been employed or permitted to work during any portion of the taxable year; or (b) any mill, cannery, workshop, factory, or manufacturing establishment situated in the United States in which children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen and sixteen have been employed or permitted to work more than eight hours in any day or more than six days in any week, or after the hour of seven o'clock post meridian, or before the hour of six o'clock ante meridian, during any portion of the taxable year, in addition to all other taxes imposed by law, an excise tax equivalent to ten percentum of the entire net profits received or accrued for such year from the sale or disposition of the product of such mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment." Revenue Act, 1918, § 1200.

[4] Knowlton *v.* Moore, 178 U. S. 41.

[5] Collins *v.* New Hampshire, 171 U. S. 30.

when this right is exercised for the purpose of destroying something over which it has absolutely no regulative power, has it not exceeded this right and overstepped its bounds? This principle was elucidated somewhat by Justice Peckham in *Collins* v. *New Hampshire*.[6] The New Hampshire legislature had passed what purported to be an inspection law, but which, in effect, prohibited the sale and importation of oleomargarine. States have the power to make inspection laws but no power to regulate interstate commerce, and consequently the court looked to the motive and purpose of the legislature and declared the law unconstitutional. By parity of reasoning the purpose intended by Congress must be accomplished in a manner consistent with constitutional limitations and not by an invasion of the powers of the State.[7] Investigation or whether or not Congress has done indirectly that which it cannot do directly, is not foreclosed by the fact that courts do not pass upon the motives of the legislature. Courts do not pass upon such motives to determine whether they are good or bad, but when a power is called into play, not for the purpose for which it was given but for a covert purpose, the duty is incumbent upon the courts to determine the validity of such action. Covert legislation arises where the constitutional authority for the legislation in question bears no sincere relation to the purpose sought to be obtained. Legislation may properly be called covert though its purpose and effect is to destroy what is admitted to be an evil.[8] The purpose here is clearly to prohibit child labor and not to raise revenue. Congress has no constitutional power to regulate child labor within the State in any way. It is true that the power to tax is the power to destroy, but the thing destroyed must be something over which Congress has regulative power at least. Thus, Congress has the power to lay an indirect tax on bonds, notes, mortgages and other evidences of contracts, but should it attempt to destroy such contracts by declaring them void if not stamped, it exceeds this power and its act is unconstitutional;[9] nor can Congress make a tax stamp a prerequisite to the admissibility of such instruments in evidence in the State courts;[10] nor has Congress the power to tax instrumentalities and agencies of the State such as State judicial process,[11] municipal bonds [12] or salaries of State judicial officers.[13] It is not denied that Congress has the power to tax a State judicial officer as an individual and, so long as the tax comes under the classification of indirect taxes, that power is not limited by any apportionment requirement. But should the purpose and effect of the tax be to restrict and limit or destroy his capacity as a State of-

[6] *Supra.*
[7] Hammer *v.* Dagenhart, *supra.*
[8] See Hammer *v.* Dagenhart, *supra.*
[9] Moore *v.* Moore, 47 N. Y. 467, 7 Am. Rep. 466.
[10] Carpenter *v.* Snelling, 97 Mass. 452.
[11] Smith *v.* Short, 40 Ala. 385.
[12] Pollock *v.* Farmers' Loan and Trust Co., 157 U. S. 429.
[13] Collector *v.* Day, 11 Wall. 113.

ficer, although the tax in itself is within the power of Congress, it would nevertheless be unconstitutional, since it would, in reality, be an attempt by Congress to regulate something over which it has no control whatsoever.[14] It is always within the province of the courts to determine in particular cases when the extreme boundary of the legislative power has been reached and passed.[15]

The only case which apparently is in conflict with the above contention is *Veazie Bank* v. *Fenno*,[16] which holds that the Federal Government has the power to tax the bank-notes of State banks, even though the expressed purpose and motive in doing so is to prohibit such notes, something which the Federal Government has not the power to do by direct action. But upon analysis it will be found that the decision is based, not on the absolute power of taxation vested in Congress, but rather upon the fact that Congress has the power to regulate the currency. Viewed from this standpoint it is disrobed of its hostile appearance. It was also held by the Supreme Court in *McCray* v. *United States*,[17] that Congress has the power to tax oleomargarine so high as to amount to a prohibition of its manufacture. This decision was based on the rule that the motive and purpose of the legislature is immaterial so long as the power to tax exists. In other words, Congress may abuse its taxing power to the fullest extent, and will only be responsible to its constituents, the people, and never amenable to the courts. However, where it is plain to the judicial mind that the taxing power has been called into play, not for the purpose of raising revenue, but solely for the purpose of destroying rights in a manner inconsistent with constitutional limitations and restrictions, it is the duty of the court to declare that such an arbitrary act is not merely an abuse of a delegated power but is the exercise of authority which has never been conferred.[18] This case of *McCray* v. *United States*,[19] as authority for the view that for no purposes can the motive of the legislature be inquired into, is confined strictly to objects of taxation that are in the same class as oleomargarine.

The question then arises as to whether products of child labor are to be protected from the ravages of destructive legislation while oleomargarine and goods that are inherently bad or defective are not. In arriving at a correct answer it is first necessary to ascertain

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[14] See Collector *v.* Day, *supra.*

[15] Board of Education *v.* State, 51 Ohio St. 531, 38 N. E. 614, 46 Am. St. Rep. 588, 25 L. R. A. 770.

[16] 8 Wall. 533.

[17] 195 U. S. 27.

[18] See 1 COOLEY, TAXATION, 3rd ed., p. 191.

[19] *Supra.* The Court said: "Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated and where it was plain to the judicial mind that the power had been called into play not for revenue but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred."

in what manner and to what extent similar articles have been regulated by legislative action in the past. It is settled that Congress has the power to declare any article that is inherently bad to be an illegitimate article of commerce and thereby prohibit its transportation in interstate commerce.[20] But it is only such goods that are defective in themselves that can be so dealt with, and goods that are not inherently objectionable, but are made so by extrinsic association, such as products of child labor. do not come under this power of Congress.[21] Likewise, the States have no power to tax the manufacture of articles that are not inherently evil or different from other articles, since the States cannot in the exercise of their taxing power make arbitrary and unreasonable classifications, being restricted in this by the fourteenth amendment to the Federal Constitution which declares that no State shall deny to any person equal protection of the laws.[22] Thus, a State tax on goods made by convicts is a violation of this clause. Such a tax is upon the origin of the goods and not on the goods themselves and, being made with utter disregard of their good or bad character, is an arbitrary and unreasonable classification. It amounts to the same thing as declaring that goods manufactured by factories employing black haired men shall be taxed. Such a classification is unreasonable and capricious.[23] Hence a State cannot constitutionally tax products of child labor while, on the other hand, it may tax oleomargarine and like objects which are inherently bad. The law deducible from this doctrine is that articles in the class with products of child labor are guaranteed by the Constitution and are to

[20] Webb-Kenyon Act, 37 Stat. 699, Comp. Stat. '16, § 8739. This act was upheld as constitutional in the case of United States *v.* Oregon-Washington Co., 210 Fed. 378.

[21] Hammer *v.* Dagenhart, *supra.*

[22] People *v.* Raynes (N. Y.), 136 App. Div. 417, 120 N. Y. Supp. 1053.

[23] Peoples *v.* Raynes, *supra.* The Court in a well-reasoned opinion distinguished the classification as follows: "While the taxing power may be extended to all kinds of persons or property within the state, or may be restricted to certain kinds, or limited area, * * * it is subject to the one great rule that all persons, under like circumstances, shall be treated in the same way. Persons and property may be classified for taxation, but such classification may not be arbitrary unreasonable, or capricious. * * * So that if we ignore in this statute its obvious purpose, writ so plain that all may read, namely, to prohibit by onerous and exasperating restrictions, under the guise of regulation, the buying and the selling within this state of convict-made goods, and treat it purely as a revenue or tax law, the inquiry is: Is its classification reasonable and capricious? * * * That classification is based upon the origin of the goods dealt in, without regard to the quality or character or nature of the goods themselves. * * * If such classification be valid, and if the purpose of the act, as is claimed, is to protect free labor from prison labor, why in these days of contests between organized and unorganized labor should not an act be passed which provided for a license for selling all goods made in a shop which did not employ union labor, and then, if the advocates of a free shop were in power, repeal it, and provide for such license for all goods made in shops which employed union labor, * * *. All these classifications would be based on origin, as is that under consideration."

be accorded more protection by the courts than articles in the class with oleomargarine. In view of this difference and in view of the restriction placed on the application of the doctrine of *McCray* v. *United States, supra,* the conclusion must be reached that the right of manufacturers to employ child labor is a right that cannot be restricted or destroyed by the Federal Government by the indirect method of taxation.

It being decided that neither the Federal nor the State Government can tax products of child labor, the question arises as to how this evil can be regulated or prohibited. It is within the police power of the State to pass any laws which may be necessary to protect the physical health, safety or morals of people in all classes of employment,[24] and this power has never been delegated to the Federal Government.[25] The Virginia legislation on the subject has culminated in the enactment of several acts which are now in force. In 1912 an act was approved by the General Assembly, entitled, "An ACT concerning coal mines and safety of employees * * *." [26] Section 15 of this act provides that no boy under fourteen years of age or female person of any age shall be permitted to work in coal mines. Again, in 1914, an act was passed, entitled, "An ACT to regulate the employment of children in factories, mercantile establishments, workshops and laundries, and as messengers, or selling or distributing newspapers or other periodicals in this Commonwealth * * *." [27] This act is an attempt to regulate all child labor and provides, among other things, that no child under ten years of age shall distribute newspapers; that no child under fourteen shall be employed in any factory, etc.; and that no male person under twenty-one or female of any age shall work in any place where liquor is sold, kept or manufactured, except an hotel. In 1918 this act was amended, thereby enlarging its scope and making it more drastic.[28] The constitutionality of these statutes has never been questioned.

TESTIMONY OF A WITNESS AS A PRIVILEGED COMMUNICATION.—It is commonly stated that there are two rules, the English and the American, governing the privilege of a witness in a judicial proceeding. The English rule provides that the statements of a witness in a judicial proceeding are absolutely privileged, and that no action for defamation lies for any words spoken on the witness stand. This rule has been modified by the American courts to the extent that the statements, in order to be privileged, must be relevant, thus making relevancy the test of the privilege. If relevant, the statements are absolutely privileged; even if irrelevant and

[24] See Muller *v.* Oregon, 208 U. S. 412.
[25] See U. S. *v.* Dewitt, 9 Wall. 41.
[26] Acts 1912, page 419.
[27] Acts 1914, page 671. See 1 VA. LAW REG. (N. S.) 634.
[28] Acts 1918, page 347.